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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 464

CHICAGO GREAT WESTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

LESLIE J. KENNY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above entitled case on July 26, 1955.

OPINION BELOW

The opinion of the Supreme Court of the State of Minnesota (T. pp. 393-402) is reported in 71 N. W. 2d 669.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was entered July 26, 1955 (T. p. 403, infra). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257 (3), infra (App. A).

QUESTION PRESENTED

Whether the evidence establishes causal connection between plaintiff's injuries and defendant's negligence.

STATUTE INVOLVED

The statutory provision involved is Section 51 of the Federal Employers' Liability Act, U.S.C.A., Title 45, printed in Appendix A, infra.

STATEMENT

This action was brought by plaintiff under the Federal Employers' Liability Act to recover damages for injuries allegedly caused by the negligence of the defendant on June 2, 1951, when a collision occurred between a freight train and five diesel units owned by defendant at North Hanover, Illinois. Plaintiff was working as a brakeman on the forward diesel engine of the five units. Shortly before the collision, when it appeared imminent, plaintiff descended the steps on the left side of the diesel unit, then traveling at a speed of approximately 25 miles per hour, and prepared to step off. The only evidence of the manner in which plaintiff alighted after leaving the diesel locomotive was his own testimony which unequivocally shows that at the time he landed

on the ground his body was in a backward-bending posture. The essential testimony in this respect is as follows:

"A. I dropped off on to my right heel.

Q. Right foot or right heel. Then after that your left foot came down upon the ground.

A. Yes. I let go all at once.

Q. That's the accepted and usual method of leaving the train when it is underway or when it is moving.

A. Yes.

Q. When you struck the ground after both of your feet had touched the ground, you straightened up and leaned back so that you wouldn't be pitched by the force of the movement of the train head first.

A. I didn't straighten up.

Q. Didn't you lean back?

A. I leaned back and then by straightening up you keep your balance.

Q. That's right. You leaned back because if you lean forward and bend over, the momentum would carry you ahead and you would fall.

A. That is right.

Q. So you leaned back, and by leaning back you prevented yourself from falling.

A. That's right.

Q. You ran a few steps after that.

A. Yes.

Q. Then you came to a stop without leaving your feet.

A. Yes.

Q. Isn't that correct?

A. Yes."

(T. 212-213)

The plaintiff attempted to prove that he had suffered compression fractures of the first and third lumbar vertebrae together with corresponding soft tissue injury in the lumbar

region of his back in this manner. To this end, plaintiff called one medical witness, Dr. Leonard Titrud. The undisputed medical evidence, on the basis of x-rays taken of plaintiff's back subsequent to the accident, is that there was a slight anterior narrowing of plaintiff's first and third lumbar vertebrae (T. 158-159; 270; 347).

In 1934 plaintiff, by his own admission, fell from a ladder a distance of approximately 15 feet at which time he fractured his hip resulting in plaintiff's right leg thereafter being an inch or more shorter than his left leg. This caused plaintiff to limp permanently (T. p. 139). Drs. Moe and Anderson testified that the condition of plaintiff's lumbar vertebrae following the accident was due to degenerative changes and scoliosis because of abnormal weight bearing on the spine produced, in turn, by plaintiff's hip deformity (T. 298, 348, 349).

In attempting to establish the causal relation between his injuries and defendant's negligence, plaintiff's counsel submitted a hypothetical question (T. 171-176) to Dr. Titrud, plaintiff's medical witness, which failed to include the essential fact of plaintiff's posture at the time he alighted from the moving train. The applicable portion of the hypothetical question is as follows (T. 171):

> "* * * that when the locomotive was traveling at a speed of about 25 to 27 miles an hour, he stepped off from the locomotive onto the bed of the roadway; that in so doing he first stepped in accordance with the practice of railroad brakemen in dismounting from a moving car with his right foot, which was his rear foot; that he struck on his right heel and then on his left heel; that upon striking on his heels he felt a severe shock go through both legs and up into his back and through his entire back, resulting in pain through the legs and

through the entire back; that he ran a distance until he was able to stop the momentum of his body and did not fall to the ground; * * *"

To this defendant objected (T. 174, 175). On October 25, 1954, defendant moved for judgment notwithstanding the verdict on the ground, among others, that the Court erred in denying defendant's motion for a directed verdict in his favor for the reason that as a matter of law it appeared from the evidence that plaintiff's injuries, if any, were not proximately caused by defendant's negligence. On said date, defendant concurrently moved in the alternative for a new trial on the grounds, among others, that the verdict was contrary to law, and that the Trial Court erred in permitting plaintiff's witness, Dr. Leonard Titrud, to testify over defendant's objection as to whether the alleged accident of June 2, 1951, hypothetically described by plaintiff's counsel, was the cause of plaintiff's back condition (T. 386-388). By order of November 10, 1954, the Trial Court denied both motions (T. 388-390). On November 30, 1954, defendant noticed its appeal to the Supreme Court of the State of Minnesota, and in its subsequently filed brief made the following assignments of error, among others, as follows:

"1. The Trial Court erred in overruling defendant's objection to plaintiff's counsel's hypothetical question at R. p. 171 et seq.

2. The Trial Court erred in allowing plaintiff's expert medical witness, Dr. Titrud, to give his expert opinion as to the cause of plaintiff's then present condition and injuries.

3. The Trial Court erred in denying defendant's Motion for a Directed Verdict in favor of the defendant at the close of the testimony on the ground that, as a matter of law, it appeared from the evidence that plaintiff's

injuries, if any, were not proximately caused by defendant's negligence. * * *"

The Supreme Court affirmed the judgment of the lower court, holding that there was sufficient evidence to support the jury's findings that plaintiff's alleged injuries and disability were caused by the accident (T. 400-401); and that defendant was not in a position to question the sufficiency of the foundation of plaintiff's hypothetical question to Dr. Titrud where defendant had failed to object to the hypothetical question on the ground that it assumed a material fact not in evidence and failed to move to strike such opinion testimony of Dr. Titrud (T. 395-400).

REASONS FOR GRANTING THE WRIT

1. The principal issue here, whether the evidence establishes causal connection between defendant's negligence and plaintiff's injuries, is of the utmost importance to all federal employers coming within the purview of the Federal Employers' Liability Act. Section 51 of that Act, in substance, provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while employed by such carrier where such injury results from the negligence of the common carrier or its agents. Where, as here, there is no question of the carrier's negligence, the only burden upon the injured employee is to prove that his injuries were proximately caused by the defendant's negligence.

In the instant case, plaintiff alleged back injuries. Necessarily, plaintiff in such a situation must prove the causal connection between his injuries and defendant's negligence by expert medical testimony. There was only to show upon

an adequate factual foundation that plaintiff's condition resulted from defendant's negligence. Therefore, the construction of said Section 51 of Title 45, U.S.C.A. is put in issue and a federal question arises.

The undisputed medical evidence is that if the condition of plaintiff's first and third lumbar vertebrae were caused by a fall, plaintiff necessarily would have been in a forward-flexed or forward-bending position (T. 166-167; 189-190; 270; 347). Since plaintiff's medical witness so testified, it was incumbent upon plaintiff to show that his body was in a forward-flexed or forward-bending posture at the time he stepped from the train on June 2, 1951. This he clearly did not do (T. 212-213). Or, conversely, plaintiff's medical evidence would have to show, on the basis of plaintiff's testimony as to his posture in leaving the train, that the anterior narrowing of the lumbar vertebrae was caused by his stepping from the train in a backward-bending posture. There was not, and could not be, such supporting medical testimony.

This Court can take judicial notice of the tremendous growth in personal injury litigation under the Federal Employers' Liability Act, and the relative ease with which frauds can be perpetrated against corporate defendants, unless there is some definitive rule for establishing causal connection, where, as here, defendant's negligence and plaintiff's condition are established beyond dispute.

2. The Trial Court's denial of defendant's Motion for judgment notwithstanding the verdict or for a new trial, and the Minnesota Supreme Court's decision to the effect that there was sufficient evidence of causal connection is palpably unjust and erroneous. Likewise, the Minnesota Supreme Court's decision to the effect that defendant did not object to the hypothetical question, from which alone plaintiff

could establish the causal connection, is palpably unjust and erroneous and without foundation in fact or law. Contrary to that decision, which in effect says that plaintiff didn't know what he was testifying about (T. p. 398), the record is clear that at the time plaintiff stepped back from the moving train he was in a back-bending position in the accepted and usual method of railroad brakemen dismounting.

It is only common sense that a person stepping from a moving vehicle traveling 25 miles per hour would have to lean backward and "run with the vehicle" in order to maintain his balance, and that is precisely what plaintiff testified he did. Had he bent forward in stepping from the train common sense, again, would dictate that he would be pitched headfirst, and plaintiff did not at any time fall down (T. pp. 212-213).

Further, the record clearly shows that defendant's counsel objected seasonably and adequately to plaintiff's hypothetical question (T. 174, 175). Defendant's objection that it was "* * * an improper hypothetical question * * *" was sufficient, without more, with respect to the omission by plaintiff of the essential fact of plaintiff's posture as he stepped from the moving train. Dunnell's Minnesota Digest, Section 9740. In addition to this, defendant noted an exception to the Court's ruling on defendant's objection.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

28 U.S.C.A., Section 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) * * *

"(2) * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question of where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 928."

45 U.S.C.A., Section 51:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon

such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

APPENDIX B

No. 85 Mower County Christianson, J.

LESLIE J. KENNEY,

Respondent,

36563 vs.

CHICAGO GREAT WESTERN RAILWAY CO.,

Appellant.

Endorsed: Filed July 15, 1955, Frank Larkin, Clerk

Minnesota Supreme Court

SYLLABUS

1. In action under the Federal Employers' Liability Act to recover for personal injuries allegedly sustained by plaintiff where defendant did not object to hypothetical question asked plaintiff's medical expert as to cause of plaintiff's present physical condition or to opinion testimony given in response thereto on the ground that it assumed a material fact not in evidence and no motion to strike such opinion testimony was made, *held* that defendant was in no position to question the sufficiency of the foundation therefor on appeal, particularly where defendant went into the matter fully on cross examination.

2. Evidence considered and *held* sufficient to support jury's finding that plaintiff's alleged injuries and disability were caused by the accident in question.

3. Under the facts and circumstances presented, verdict for plaintiff in the sum of $27,500 *held* not excessive.

Judgment affirmed.

OPINION

CHRISTIANSON, Justice.

This is an action under the Federal Employers' Liability Act (35 Stat. 65, as amended by 36 Stat. 291, and 53 Stat. 1404, 45 U. S. C. A., § 51, *et seq.*) to recover for personal injuries allegedly sustained by plaintiff as a result of negligence on the part of defendant's agents and employees. The jury returned a verdict for plaintiff for $27,500, and defendant appeals from the judgment entered following the Trial Court's denial of its alternative motion for judgment notwithstanding the verdict or for a new trial.

Because of the limited scope of the questions raised on appeal we shall set out only those facts necessary to the decision.[1] Plaintiff was employed by defendant corporation at the time of his injury. On June 2, 1951, plaintiff was working as a brakeman on a freight train which was proceeding at 25 miles per hour. Perceiving that a head-on collision with another train was imminent, defendant descended the ladder on the left side of the first unit and prepared to jump to the ground. When there was approximately 50 feet between the two trains, plaintiff dropped to the ground in the accepted manner for trainmen by putting his right foot near the ground and then letting go of the handrail on the ladder. His right foot struck the ground and then his left. Plaintiff testified that he landed on his heels and received a severe shock accompanied by sharp pain which traveled up his legs and into his back. When both of his feet were on the ground, plaintiff leaned backward to maintain his balance and took

[1] A complete set of facts may be found in Johnson v. Chicago G. W. Ry. Co. —— Minn. ——, 64 N. W. (2d) 372, which arose out of the same accident.

short and fast steps in order to check his speed. Plaintiff never lost his balance or fell to the ground.

Plaintiff alleges that the shock incurred upon alighting from the train caused a severe paravertebral lumbar contusion and strain which involved soft tissues such as ligaments and muscles about the lumbar spine and deformation of the first and third lumbar vertebrae through compression fractures which resulted in a traumatic flexion type of injury giving a wedge-shaped appearance to the anterior side of the vertebrae by flattening of the front part. The injury will be a source of constant pain to plaintiff and he is restricted in his forward bending by 50 percent, sideways bending by 50 percent, and backward bending by 100 percent. Plaintiff is permanently and totally disabled from performing the work of a railroad brakeman. At the time of the accident he had a life expectancy of 22.65 years and was earning approximately $4,600 per year. His work experience is limited to railroading and truck driving and he has only a high school education. Following the accident, plaintiff has been able to till 120 acres of his 170-acre farm with a tenant farmer, and since March 1, 1952, he has operated the entire farm with some aid. During 1953 his income from the farm was $1,700 and in 1952 he lost $80. While performing the farm work plaintiff is subjected to sharp pain from this back condition and during his waking hours he must wear a corset-type, canvas belt enclosing pliable metal supports which starts at the middle of the buttocks and extends to a point several inches below the arms in the front and back. Plaintiff's sleep is interrupted by pain approximately two or three times per night. In the future plaintiff's condition will not improve and effective relief from the pain is not possible.

1. Defendant contends that the medical opinion of plaintiff's medical witness Dr. Leonard Titrud to the effect that the drop to the ground from the moving train and the resulting shock which traveled into plaintiff's back caused plaintiff's present back condition was conjectural, speculative, and lacked proper foundation. Since he did not examine plaintiff immediately following the accident, Dr. Titrud's opinion was based upon a hypothetical question which defendant contends furnished an improper foundation for the expert opinion since it omitted the allegedly essential fact that plaintiff was upright and bending backward upon alighting. According to defendant's medical experts plaintiff would have had to be in a flexion or forward flexed position when his feet touched the ground in order for him to have sustained a compression fracture of the anterior side of his lumbar vertebrae.

Plaintiff's testimony on direct examination regarding the sequence of his positions upon alighting from the train consisted of the following statements:

> "I put my one foot down close to the ground—as close as I could, and then I let go and lit on the back of my heels and leaned back to keep my balance; and when I lit on my heels, I got a severe shock at that speed that went up through my legs and body, and it was a sharp pain; * * *."

On cross examination plaintiff testified:

> "Q. When you struck the ground after both of your feet had touched the ground, you straightened up and leaned back so that you wouldn't be pitched by the force of the movement of the train headfirst.
>
> "A. I didn't straighten up.
>
> "Q. Didn't you lean back?

"A. I leaned back, and then by straightening up you keep your balance."

In the foregoing testimony plaintiff's position while in the air and immediately upon the touching his heels to the ground is not disclosed. The testimony establishes, if anything, that plaintiff did not lean back until after his feet touched the ground and he had already received the shock which allegedly injured his spine. Moreover, except for the speculative opinion of one of defendant's medical experts,[2] there is no direct testimony in the record establishing the position of plaintiff's spine as his heels struck the ground.

Ordinarily determination of whether there is a sufficient foundation for the opinion of an expert rests within the sound judicial discretion of the trial judge. Where a hypothetical question is used, it must embody substantially all the facts relating to the subject matter.[3] As this court stated in Wittenberg v. Onsgard, 78 Minn. 342, 347, 81 N. W. 14, 15:

> " * * * All hypothetical questions must be based upon facts admitted or established, or which, if controverted, might legitimately be found by the jury from the evidence. Such a question should embody substantially all the facts relating to the subject upon which the opinion of the witness is asked, since the opinion of the witness is worthless, and may be misleading, if given on a state of facts that does not exist, or upon an incomplete statement of the facts bearing upon the subject upon which the opinion of the witness is asked."

[2]Dr. John H. Moe, a witness for the defendant, testified that, based on *his* interpretation of the mechanism of getting off a train, plaintiff would have been erect or, if anything a little bent backwards. However, this opinion was not correlated with plaintiff's actual movements upon jumping from the train.

[3]Smith v. Twin City Motor Bus Co. 228 Minn. 14, 36 N. W. (2d) 22; Harju v. Allen, 146 Minn. 23, 177 N. W. 1015.

The hypothetical question in the instant case was based upon Dr. Titrud's four physical examinations of plaintiff over a 20-month period as well as his study of the x-rays, and it included all the evidence introduced regarding the manner in which plaintiff dismounted from the train, but omitted any suggestion as to plaintiff's position while in the air and when his heels first struck the ground. However, the controlling question before us is not whether Dr. Titrud could properly render the opinion he did as to the cause of plaintiff's condition without assuming that plaintiff was in a forward flexion position when he first struck the ground—a material fact which at most is only supported by inference from the physical facts and plaintiff's subjective complaints[4] —but whether, on the basis of the record presented, defendant is in a position to question the sufficiency of the foundation for his opinion on appeal.

The position of plaintiff's spine when he first struck the ground was perhaps unknown or unknowable to him under the stress of jumping from a train proceeding at a rate of approximately 25 miles per hour in the face of the impending head-on collision. Hence, evidence regarding whether the shock plaintiff received when his heels struck the ground caused the compression fracture of his lumbar vertebrae was left almost wholly to medical testimony and, barring conflicts in the facts or the inferences to be drawn therefrom, the opinion of the medical experts would be conclusive upon the jury.[5]

Although defendant objected to the hypothetical question

[4]A hypothetical question which assumes a material fact not in evidence is uniformly held to be properly excludable. See, *e.g.*, Hanrahan v. Safway Steel Scaffold Co. 233 Minn. 171, 181, 46 N. W. (2d) 243, 249.

[5]See, 7 Dunnell, Dig. (3 ed.) § 3334.

first put to Dr. Titrud on the ground that it failed to include certain facts, which plaintiff's counsel thereafter supplied, defendant did not object thereto or move to strike his opinion testimony upon the ground that it assumed that plaintiff was in a forward flexion position when he struck the ground. In fact, no objection was ever raised to Dr. Titrud's opinion testimony upon this ground until defendant's motion for new trial. Such being the case, defendant is no longer in a position to question the admissibility of his testimony on grounds not asserted at the trial because of the elementary, but practical, principle that a party should not be able to assure himself of a new trial by allowing the Trial Court to commit error in the admission of evidence without appropriate objection[6] and the corollary rule that, where no motion is made to strike out an answer to a proper question, the propriety of the answer will not be reviewed on appeal. Johnston v. Selfe, 190 Minn. 269, 251 N. W. 525. While this rule is not applicable where proper objection to the introduction of improper evidence is made before such evidence is received,[7] the ground now asserted by defendant was not raised by its objections at the trial and it is therefore precluded from raising the question on appeal. Cf. Hartmon v. National Heater Co., 240 Minn. 264, 275, 60 N. W. (2d) 804, 812. Furthermore, even if it be assumed for purposes of argument that Dr. Titrud's opinion testimony should have been excluded if appropriate objection had been made and no further foundation laid, the record discloses that defendant went into the matter fully on cross examination and thereby waived any right to have such opinion testimony stricken. Cf. Brown v. Morrill, 45

[6]See, Mason's Dunnell, Minn. Pract. §§ 3206, 3217; 6 Dunnell, Dig. & Supp. §§ 9728, 9739.

[7]See, Madson v. Christenson, 128 Minn. 17, 23, 150 N. W. 213, 215.

Minn. 483, 48 N. W. 328; Barnes v. Christofferson, 62 Minn. 318, 64 N. W. 821; Parris v. McKay, 165 Minn. 241, 206 N. W. 393.

We therefore conclude that there is no basis in the record for defendant's contention that there should be a new trial because of the admission of Dr. Titrud's opinion testimony.

2. Defendant also contends that the verdict establishing that plaintiff's injuries were caused by defendant's negligence is not supported by the evidence. Ordinarily a finding of proximate cause is reserved to the jury. As we recently stated in Berg v. Ullevig, —Minn.—,—, 70 N. W. (2d) 133, 138:

> " * * * The test, of course, is not whether the trauma resulting from another's negligence might, only in the realm of possibility, have been a factor in producing a certain result, but whether it was a factor or at least a probable factor in producing the claimed result."

In this case where the question of causation was dependent upon medical opinion testimony the jury was presented with a conflict between the opinion of Dr. Titrud that the shock received upon dropping from the train did cause a compression fracture to plaintiff's lumbar vertebrae and those of defendant's experts to the effect that the injury was not due to the drop from the train but, among other things, postural change caused by improper weight bearing which resulted from a fracture of his hip in 1934. Although defendant has shown other possible causes for the condition of plaintiff's back, plaintiff has introduced competent evidence that the traumatic force occurring when plaintiff's heels touched the ground was not merely a possible causal factor of the condition but that it was the causal factor which produced a

compression fracture of the lumbar vertebrae in plaintiff's back. Moreover, in light of the permissible inference arising from the testimony of plaintiff that he received a severe shock accompanied by sharp pain which traveled up his legs and into his back when alighting from the moving train and the fact that plaintiff has been physically incapacitated from working as a railroad brakeman since the accident, the jury could have found that plaintiff was in a flexion position when his heels touched the ground and thereby resolved the conflict in the opinion testimony of the medical experts. In view of the foregoing we cannot say as a matter of law that plaintiff's injuries were not caused by the shock resulting when his heels struck the ground. Hence we find no merit in defendant's contention that there is no evidence to support the jury's verdict or that the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict.

3. Defendant also contends that the verdict is excessive and not justified by the evidence. In Hallada v. G. N. Ry. Co., — Minn. —, —, 69 N. W. (2d) 673, 686, we said:

> "* * * The reasonableness of an award for damages can be appraised only in the light of the elementary principle that plaintiff should be given neither more nor less than a sum which leaves him financially *whole* to the same extent as he would have been had no injury occurred."

Viewing the evidence in the light most favorable to the verdict, as we must, the jury could find that plaintiff suffered a compression fracture of the first and third lumbar vertebrae of his back in the accident on June 2, 1951. At this time plaintiff was 44 years old and had a life expectancy of 22.65 years. He was earning approximately $4,600 per year as a

railroad brakeman, but as a result of the accident he is totally and permanently physically disabled from returning to his work as a brakeman. The extent of plaintiff's injuries is evidenced by his testimony of constant pain and discomfort and competent medical testimony to the effect that he has a present bending restriction of 50 percent in forward movement, 50 percent in sideways movement, and 100 percent in backward movement. Plaintiff must wear a canvas belt for support during his waking hours which is ribbed with pliable metal, and he will be subject to unrelievable pain from his back. Since his accident plaintiff has been able to earn only $1,700 from his farm during 1953 while in 1952 he lost $80.

In view of the foregoing facts we cannot say that the verdict for $27,500 is excessive under the circumstances presented. It follows that the Trial Court did not err in denying defendant's motion for a new trial.

Judgment affirmed.

NOV 3 1955
HAROLD B. WILLEY, Cl

In the Supreme Court of the United States

No. 464

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Petitioner,

vs.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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In the Supreme Court of the United States

No. 464

CHICAGO GREAT WESTERN RAILWAY COMPANY,
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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

JURISDICTION

The respondent admits that this Court has jurisdiction to grant a Writ of Certiorari in this case, but he contends that this case is not a proper one for the exercise of such jurisdiction and that because that is true, the Court should deny certiorari.

STATEMENT OF THE CASE

Respondent confesses that he is not sure as to the scope of the statement of the facts which he should make. Certainly, he cannot accept the statement made by petitioner for the reason that there are statements made by the petitioner which are entirely unsupported by the evidence. Rule 23 (1) (e) of the Revised Rules of the Supreme Court of the United States provides:

"The petition for writ of certiorari shall contain in the order here indicated—

(e) A concise statement of the case containing the facts material to the consideration of the questions presented."

We have presumed this to mean that the petitioner should state accurately and precisely those facts which raise the question which he presents to the Court by his petition for review. In the light of this, we think that an adequate statement of the facts would be those set forth in the opinion of the Court below (R. 393-401).

Plaintiff's testimony regarding the sequence of his positions upon alighting from the train is there summarized as follows: (R. 396)

"I put my one foot down close to the ground—as close as I could, and then I let go and lit on the back of my heels and leaned back to keep my balance; and when I lit on my heels, I got a severe shock at that speed that went up through my legs and body, and it was a sharp pain; * * *."

On cross-examination plaintiff testified:

"Q. When you struck the ground after both of your feet had touched the ground, you straightened up and leaned back so that you wouldn't be pitched by the force of the movement of the train headfirst.

A. I didn't straighten up.

Q. Didn't you lean back?

A. I leaned back, and then by straightening up you keep your balance."

In the foregoing testimony plaintiff's position while in the air and immediately upon the touching of his heels to the ground is not disclosed. The testimony establishes, if anything, that plaintiff did not lean back until after his feet touched the ground and he had already received the shock which allegedly injured his spine.

In regard to defendant's objection to the hypothetical question asked of plaintiff's doctor, the record discloses that no objection was made to the omission of the position of the plaintiff's body at the time his feet struck the ground, but rather to other alleged omissions, namely, that the hypothetical question failed to cover *his activities immediately after the accident,* nor does it show the *extent and effect of the injury which he received to the hip in 1934*. The record (R. 175) is as follows:

> "Mr. Grannis: Same objection.
>
> The Court: Well, is counsel able to state what portion of the hypothetical question is not supported by evidence?
>
> Mr. Grannis: Yes. I don't believe that the hypothetical question covers his activities as shown by the evidence immediately after the accident, nor does it show the actual extent and character and effect of the injury which he received to his hip which was fractured in 1934.
>
> The Court: Well, I'm inclined to believe that the doctor's examination and the X-rays and the findings in that respect together with what is stated in the hypothetical question is sufficient on that ground. I don't recall whether you stated in your hypothetical question the speed of the train.
>
> Mr. Austin: Yes, I believe I did. I thought I did, your Honor. I thought I mentioned that the speed of the train at the time the man dismounted was about twenty-five to twenty-seven miles an hour.
>
> The Court: Well, the objection will be overruled, and you may be permitted to answer.
>
> Mr. Grannis: Exception.
>
> A. That that accident is the cause of his difficulty as described now.
>
> Mr. Austin: Thank you, Doctor. That's all."

In summary, the record shows that

(1) the position of plaintiff's spine when he first struck the ground is not in the testimony and (2) the defendant

made no objection during trial to the doctor's opinion in answer to a hypothetical question which omitted the position of plaintiff's body as his feet struck the ground.

I.

There is no special or important reason for the granting of a writ in the instant case.

Rule 19 of the Revised Rules of the Supreme Court of the United States provides in part:

> "Rule 19. Considerations Covering Review on Certiorari"
>
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

It is respectfully submitted that this petition neither raises a novel question nor does it show any conflict with applicable decisions of this Court.

As in the appellate procedure in the lower Courts, this petition is predicated upon a fact question and not a legal proposition. The plaintiff introduced competent evidence that the traumatic force occurring when plaintiff's heels touched the ground was not merely a possible causal factor of the condition but that it was the causal factor which produced a compression fracture of the lumbar vertebrae in plaintiff's back. (R. 176, ff. 1, 2). As pointed out by the Supreme Court of Minnesota, inferences arose from the testimony of the plaintiff that he received a severe shock accompanied by

sharp pain which traveled up his legs and into his back when alighting from the moving train and the fact that the plaintiff had been incapacitated from working as a railroad brakeman since the accident.

The medical testimony was in conflict but it should be noted that an assumption was added to the hypothetical question given to the defendant's doctors—namely, that while plaintiff *was in the air* after releasing his hold on the engine, and as his heels *struck the ground,* he was *maintaining* a position of leaning back. At no place is there evidence to this effect. Even assuming the conflict in the medical testimony, the question remains one of fact.

It is well established that fact questions in trials of Federal Employers' Liability Act cases are to be resolved by the jury and not the Court.

Bimberg v. N. P. Ry. Co., 217 Minn. 187, 14 N. W. 2d 410.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610.

Bailey v. Central Vermont R. Co., 319 U. S. 350, 87 L. Ed. 1444.

Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. Ed. 520.

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916.

Ellis v. Union Pacific R. Co., 327 U. S. 640, 91 L. Ed. 473.

Wilkerson v. McCarthy, 93 L. Ed. 403, 69 S. Ct. 413.

The opinions of the Supreme Court have declared that it is "The clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury, *Tiller v. Atlantic Coast Line R. Co.,* supra; that such cases may not be taken from the jury merely

because the question of liability is "close or doubtful," *Bailey v. Central Vermont Ry.* supra; that the jury has the right to make "all reasonably possible inferences" from such probative facts in the evidence as it chooses to accept, and "It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences," *Tennant v. Peoria & P. U. Ry. Co.*, supra; that in any choice between possible inferences "a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference but only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear," *Lavender v. Kurn*, supra; courts may not act on the theory that "juries will fall short of a fair performance of their constitutional function" but they must assume that a jury "finds facts only because they are proved," *Wilkerson v. McCarthy*, supra.

In *Ellis v. Union Pacific R. Co.*, supra, the Court said:

> "Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fairminded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

The above is the law that the lower Court applied in the instant case and as submitted presents no novel nor conflicting law as compared with the decisions of this Court. For this reason alone the petition should be denied.

II.

There is no merit to the legal propositions advanced by appellant.

In addition to the objection that the instant case is not a proper one for Petition for Writ, the plaintiff submits that there is no merit to the legal propositions advanced by the appellant. We will not reiterate the argument advanced above showing that the causal relation was a fact question for the jury, but will confine this to the objection to the hypothetical question.

The defendant objected to the hypothetical question first put to Dr. Titrud on the ground that it failed to include certain facts as to his activities immediately after the accident and the character and effect of the hip injury of 1934. There was no specific objection to what it has raised on appeal—namely, that it failed to include the posture of the plaintiff as his heels struck the ground. The Minnesota Supreme Court held that this ground was not raised by its objections at the trial. This not only is the law in Minnesota but also the federal law.

Hawkins v. Missouri Pac. R. Co., C. A. Ark. 1951, 188 Fed. 2d 348.

United States v. Stone, 106 U. S. 525, 1 S. Ct. 287.

Woodbury Patent Planing Machine Company v. Keith, 101 U. S. 479, 25 L. Ed. 939.

The reason for the rule is stated in *American Jurisprudence, Appeal and Error*, Section 246, as follows:

> "The general rule, subject to certain limitations and exceptions hereinafter noted, is that an appellate court will consider only such questions as were raised and reserved in the lower court. This rule is based upon considerations of practical necessity in the orderly ad-

ministration of the law and of fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel. Obviously, the ends of justice are served by the avoidance of the delay and expense incident to appeals, reversals, and new trials upon grounds of objection which might have been obviated or corrected in the trial court if the question had been raised. There would be no assurance of any end to the litigation if new objections could be raised on appeals. Where a party has the option to object or not, as he sees fit, the failure to exercise the option when the opportunity therefor presents itself must, in fairness to the Court and to the adverse party, be held either to constitute a waiver of the right to object, or to raise an estoppel against the subsequent exercise thereof."

CONCLUSION

The Petition for Certiorari raises no substantial question for the consideration of this Court. We therefore respectfully submit that the Court should deny the Petition for Certiorari, and further submit that Rule 56, Section 4 of the United States Supreme Court rules should be applied in the instant case.

Respectfully submitted,

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